

IN THE
Supreme Court of the United States

OCTOBER TERM, 1992

BARCLAYS BANK PLC,
Petitioner,

v.

FRANCHISE TAX BOARD, AN AGENCY OF THE
STATE OF CALIFORNIA,
Respondent.

On Petition for a Writ of Certiorari to the
Court of Appeal of the State of California
in and for the Third Appellate District

**BRIEF OF THE MEMBER STATES OF THE
EUROPEAN COMMUNITIES AND THE GOVERNMENTS
OF AUSTRALIA, AUSTRIA, CANADA, FINLAND,
JAPAN, NORWAY, SWEDEN AND SWITZERLAND
AS AMICI CURIAE SUPPORTING PETITIONER**

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Japan, Norway, Sweden and
Switzerland as Amici Curiae*

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INTEREST OF AMICI CURIAE

The twelve Member States of the European Communities: Belgium, Denmark, France, Federal Republic of Germany, Greece, Ireland, Italy, Luxembourg, The Netherlands, Portugal, Spain, and the United Kingdom; and the Governments of Australia, Austria, Canada, Finland, Japan, Norway, Sweden and Switzerland (herein "the

Twenty Countries") are the United States' main trading partners, accounting for the majority of U.S. trade. Nineteen of the Twenty Countries have a double taxation and/or friendship, commerce and navigation treaty in force with the United States, the effect of which is to forbid the use of the method of corporate income allocation known as worldwide combined reporting ("WWCR").¹

The issue presented by Petitioner's petition for a writ of certiorari is the constitutionality of the application of WWCR by the Respondent Franchise Tax Board of the State of California to domestic corporations with foreign parents, or foreign corporations with either foreign parents or foreign subsidiaries. This Court reserved resolution of that issue when it considered the constitutionality of Respondent's use of WWCR to tax the income of U.S. based multicorporate groups.²

Determination of the constitutionality of the application of WWCR to domestic corporations with foreign parents, or foreign corporations with either foreign parents or foreign subsidiaries, is of significant importance to the Twenty Countries. The decision will impact their future economic and commercial relations with the United States and influence future bilateral treaty negotiations.

The Twenty Countries submit this brief *amicus curiae* in support of Petitioner.³

¹ Portugal and the United States are currently involved in bilateral tax treaty negotiations.

² *Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159, 189 n.26 (1983).

³ Petitioner and Respondent have consented to the filing of this brief *amicus curiae* in letters filed with the Clerk of this Court.

ARGUMENT

Corporate citizens of the Twenty Countries are adversely affected by Respondent's use of WWCR. Respondent claims it is taxing only one corporation's operations in California. However, it includes in a taxed corporation's tax base and apportionment formula that corporation's income and property, payroll and sales factors, and the income and factors of the worldwide operations of all foreign corporations considered to be conducting a unitary business with it, with no provision for crediting the taxes already assessed upon such income in the foreign jurisdiction where it was earned.

The Twenty Countries have repeatedly expressed their formal objections to Respondent's use of WWCR as:

- (1) contradictory to, and incompatible with, accepted international principles of corporate tax assessment and the purpose of double taxation and/or friendship, commerce and navigation treaties to which the United States is a party;
- (2) an impediment to investment and trade with the U.S.⁴

⁴ Protocol to the Convention with France on Income Taxes, signed Nov. 24, 1979, 2 Tax Treaties, (CCH) 2819-23T; Demarche from Italy, President European Communities, on behalf of the Member States of the European Communities, March 13, 1980; Demarche No. 51 from the United Kingdom Embassy, March 25, 1980; Demarche No. 211 from the United Kingdom, President European Communities, on behalf of the Member States of the European Communities, October 30, 1981; Demarche No. 83 from the United Kingdom Embassy, May 18, 1982; Demarche from Belgium, President European Communities, on behalf of the Member States of the European Communities, June 29, 1982; Demarche from Greece, President European Communities, on behalf of the Member States of the European Communities, August 1, 1983; Aide-Memoire from Government of Japan, August 11, 1983; Demarche from Greece, President European Communities, on behalf of the Member States of the European Communities, September 23, 1983; Demarche No. 383/83 from Embassy of Australia, November 7, 1983; Demarche No. 461.20-LJ/hu from Embassy of Switzerland, November

The Twenty Countries have also conveyed their objections to WWCR to state and Federal courts by filing *amicus curiae* briefs. This *amicus curiae* brief and the March 6, 1993 demarche from Denmark, President European Communities, on behalf of the Member States of the European Communities, the text of which is contained in the appendix to this brief, are the latest demonstrations of the Twenty Countries' objections to Respondent's use of WWCR.

The Twenty Countries are anxious to have the question of the constitutionality of the Respondent's application of WWCR to domestic corporations with foreign parents, or foreign corporations with either foreign parents or foreign subsidiaries, resolved before more harm is done to their relations with the United States and to prevent the continued double taxation of their corporate citizens.

15, 1983; Demarche from the Republic of Germany, November 28, 1983; Demarche EA-14533 from Embassy of the Netherlands, December 21, 1983; Demarche from Belgium, President European Communities, supported by the Member States of the European Communities, the European Commission, and the Embassies of Australia, Japan, Canada, and Switzerland, January 1, 1984; Demarche from Embassy of Belgium, January 25, 1984; Aide-Memoire from Government of Japan, June 6, 1984; Demarche from Ireland, President European Communities, on behalf of the Member States of the European Communities, December 20, 1984; Demarche from the Commission of the European Communities and the Embassy of Luxembourg, August 8, 1985; Demarche from Member States of the European Communities and the Commission of the European Communities, August 30, 1985; Letter from Ambassador of Spain on behalf of Member States of the European Communities to U.S. Secretary of State, James A. Baker III, June 30, 1989; Demarche from the United Kingdom, President European Communities, on behalf of the Member States of the European Communities, July 22, 1992.

CONCLUSION

The twelve Member States of the European Communities: Belgium, Denmark, France, Federal Republic of Germany, Greece, Ireland, Italy, Luxembourg, The Netherlands, Portugal, Spain, and the United Kingdom; and the Governments of Australia, Austria, Canada, Finland, Japan, Norway, Sweden and Switzerland ask that Petitioner's petition for a writ of certiorari be granted.

Respectfully submitted,

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Japan, Norway, Sweden and
Switzerland as Amici Curiae*

Dated: April 22, 1993

APPENDIX

APPENDIX

ROYAL DUTCH EMBASSY
Washington, D.C.

The Honorable
Warren Christopher
Secretary of State
Washington, D.C. 20020

Copy (copies) 1 Enclosure(s) Ref.: 30, USA, 6/1

Date 3, 26, 1993

Dear Mr. Secretary:

We have the honor to convey to you the attached note on unitary taxation on behalf of the Governments of the Member States of the European Community and the Commission of the European Communities.

We avail ourselves of this opportunity to renew to you the assurances of our highest consideration.

/s/ Peter P. Dyvig
PETER P. DYVIG
Ambassador of Denmark
EC-Presidency

/s/ Andreas van Agt
ANDREAS VAN AGT
Ambassador of the
Delegation of the Commission
of the European Communities

UNITARY TAXATION

1. The Member States of the European Community and the European Commission note with dismay that the California Supreme Court recently denied the petition for review of the finding of the California Court of Appeal in the case of *Barclays Bank v. California Franchise Tax Board* which, together with the earlier decision of the California Supreme Court, held that the worldwide combined reporting imposed on foreign multinational corporations by the State of California is constitutional.
2. The worldwide combined reporting method of taxation is contrary to the internationally accepted arm's length taxation method which underlies the double taxation treaties and friendship, commerce and navigation treaties constituting the framework for international cooperation among the Member States and the United States.
3. The views of the EC Member States on worldwide unitary taxation are well known to the United States Government. All Member States have expressed their strong opposition to this tax in a number of diplomatic communiques to the United States Government from 1980 to the present date. Most recently the Member States expressed opposition in an amicus curiae brief filed with the United States Supreme Court. All of the criticisms expressed previously are germane today. Our Member States remain firmly convinced that the unitary basis of taxation is entirely unsatisfactory. We look to the United States Government to address the issue urgently.
4. The EC Member States and the European Commission support Barclays Bank in its opposition to California's application of the unitary basis of taxation. We strongly urge the United States Government to support the Barclays petition for certiorari to the United States Supreme Court and to continue its amicus curiae support.

Washington, D.C.
March 26, 1993